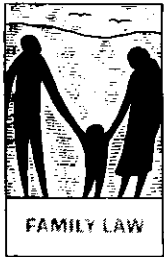


## Jurisdiction Does Not Follow When Custodial Parent Moves

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As society has become more mobile, the courts have been presented with increasingly complex child custody issues. One such issue is determining which court should decide child custody modification requests in cases where the custodial parent and minor children have moved to another state.

A recent appellate court decision, *Graham v. Superior Court*, provides some guidance on this issue. In a case of first impression, the *Graham* court held that under the Uniform Child Custody Jurisdiction and Enforcement Act, custody jurisdiction remains in California where the non-custodial parent remains in California and regularly exercises his visitation with the children. 2005 DJDAR 11668 (Sept. 23, 2005), modified Sept. 28, 2005.



In *Graham*, Lisa Zohar and Robert Graham had twin girls, who were born in California in October 2001. In October 2003, Robert and Lisa filed a stipulated judgment dissolving their marriage and providing for joint legal custody of the children, with Lisa having physical custody subject to Robert's right of visitation. One month before the judgment was entered, Lisa and the children moved to New York with Robert's consent.

Four months after moving to New York, Lisa filed a request with the New York courts to modify custody. The New York court dismissed Lisa's request on the ground that it lacked jurisdiction. On Lisa's appeal, the New York appellate court affirmed the dismissal of Lisa's custody request.

While the New York proceedings were pending, Robert filed a motion in California for make-up visitation and for permission to take the kids on a cruise. He subsequently filed another request to modify the visitation orders and, a month later, a request to modify the custody orders.

At the hearing on Robert's consolidated motions, the court declined to consider the merits of the case based on its belief that custody jurisdiction belonged in New York. In making its ruling, the court relied on Family Code Section 3422(a)(1), which provides that the trial court has continuing exclusive jurisdiction over child custody matters until it determines that (1) the children and one of their parents no longer have a "significant connection" with California; and (2) substantial evidence is no longer available in California regarding the children's care, protection, training and personal relationships.

The court determined that because the children and Lisa lived in New York, they no longer had a "significant connection" with California and, therefore, the New York court — not the California court — had jurisdiction over the custody issues.

Robert petitioned the appellate court for a writ of mandate contending that the trial court erred in focusing solely on Lisa and the children in determining that a significant connection to California no longer existed. In support of his contention, Robert cited *Kumar v. Superior Court*, 32 Cal.3d 689, a 1982 California Supreme Court decision interpreting the term "significant connection" under the old Uniform Child Custody Jurisdiction Act.

The *Kumar* court held that a "significant connection" with the original state continues as a matter of law as long as a parent who is exercising visitation still lives in the state. Lisa argued that *Kumar* was not controlling since it was based on the UCCJA, which was replaced by the UCCJEA in January 2000.

To determine whether *Kumar's* interpretation of "significant connection" was still good law, the court examined whether the Legislature had made changes to the custody modification statute that existed under the UCCJA when it enacted the UCCJEA. The court concluded that the custody modification statutes under the UCCJA and UCCJEA were virtually identical.

Citing *People v. Adkins*, 25 Cal.4th 76 (2001), the court held that since the Legislature amended the UCCJA without changing the portions of the statute that were interpreted by the *Kumar* court, the Legislature was presumed to have adopted the *Kumar* interpretation of "significant connection" and, therefore, *Kumar's* interpretation of "significant connection" applies to the UCCJEA.

The court supported its holding by a comparison of the statements made by the drafting committees of the UCCJA and UCCJEA regarding the purpose of the custody modification statutes. Both committees expressed a desire for the original state to retain modification jurisdiction where one party remained in that state.

The drafting committee of the UCCJEA

specifically stated that the intention of Section 3422 was to retain modification jurisdiction as long as one parent remained in the original state unless the relationship between the left behind parent and the children had "deteriorated sufficiently so that jurisdiction is lost."

The court reasoned that the *Kumar* interpretation of "significant connection" advances the purpose of Section 3422 as expressed by the UCCJEA drafting committee and that, therefore, under Section 3422, as long as the remaining parent asserts and exercises his visitation rights, then the parent-child relationship will not have deteriorated sufficiently to terminate jurisdiction.

The court then rejected an argument advanced by Lisa that the *Kumar* interpretation of significant connection would make the second part of Section 3422(a)(1) surplusage since as long as one parent lived in the original state, without more, there would always be a significant connection. The court pointed out that Lisa's argument incorrectly assumed either that the *Kumar* requirement that the remaining parent continue to exercise visitation is satisfied by partial or sporadic compliance or that continued exercise of visitation is not a factor distinct from residency, in effect, duplicating the "substantial evidence" requirement.

Moreover, the court reasoned that by not applying *Kumar*, if a significant connection was terminated upon a child and a parent leaving the state, there would be surplusage in Section 3422(a)(2) which provides for termination of jurisdiction when the child and both parents do not reside in the state.

In conclusion, the *Graham* decision is significant because of its holding that the *Kumar* interpretation of "significant connection" applies to the UCCJEA. The lesson to be learned from *Graham* is that in determining custody modification jurisdiction in situations where the children and custodial parent have moved from California, the focus of a family law attorney's analysis should start not with the parent and children that have left California, but rather with the parent who has remained here.



If the remaining parent continues to assert and exercise visitation with the children, then under *Kumar* and *Graham*, as a matter of law, a significant connection between the children and California still exists and jurisdiction remains in California.

However, an analysis of UCCJEA custody modification jurisdiction should not end with Section 3422. Where a party is unable to satisfy the requirements of Section 3422, that party should consider applying under Section 3427 for an order that the court decline its jurisdiction on grounds that the California court is an inconvenient forum.

A determination that California is an inconvenient forum and that another state is the better place to determine the custody issues is possible even where the parent remaining in California continues to exercise visitation. Furthermore, bringing an inconvenient forum motion under Section 3427 vests the court with greater discretion in deciding whether or not California should hear the custody issues.

Under Section 3427 the court must consider "all relevant factors" including the length of time the children have resided out of California; the nature and location of the evidence required to resolve the pending litigation, including testimony of the children; the degree of financial hardship to the parties in litigating in one forum over the other; whether domestic violence has occurred and is likely to continue in the future; which state can best protect the parties and the children; and several other specifically enumerated factors.

Obviously, having a court consider "all relevant factors" in determining whether or not to exercise custody jurisdiction gives a party a greater opportunity to succeed in transferring jurisdiction to the state where the custodial parent and children have relocated.

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